

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1311

B
PJS

To Be Argued By
Daniel J. Sullivan

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1311

UNITED STATES OF AMERICA,

Appellee,

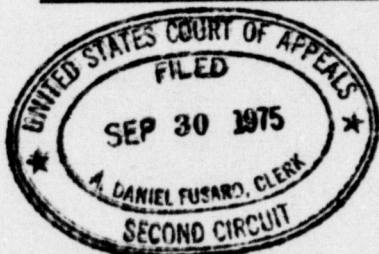
-v-

MELVIN DAVIS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT MELVIN DAVIS
WITH APPENDIX



DANIEL J. SULLIVAN

Attorney for Defendant-
Appellant Melvin Davis

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1311

UNITED STATES OF AMERICA,

Appellee,

-v-

MELVIN DAVIS,

Defendant-Appellant.

BRIEF FOR APPELLANT MELVIN DAVIS

Statement of Issue Presented for Review

When the defendant instigated and supervised the crime and was physically present at the place of its occurrence, can the Constitutional requirement that a person must be prosecuted in the District where the crime is committed be avoided because he also committed preparatory conduct in another district?

Preliminary Statement

Melvin Davis appeals from a judgment of conviction entered July 30, 1975 in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Defendant Davis was initially charged with Betty Kendrick in Indictment 75 Cr. 147, filed February 11, 1974, along with others named as co-conspirators but not as defendants, with violating Title 18, United States Code, Section 371 by conspiring to utter forged bonds in violation of Title 18, United States Code, Section 495. On April 14, 1975, this indictment was superseded by Indictment 75 Cr. 379 charging defendant Davis as the only defendant in 21 Counts. Count 1 repeated the original conspiracy charge except that Betty Kendrick became a co-conspirator not named as a defendant. Counts 2 through 21 charged Mr. Davis with separate violations of Title 15, United States Code, Section 495 relating to 20 United States Treasury bonds all involved in a single transaction.

Trial was conducted on June 30 and July 1, 1975 after which defendant Davis was found guilty on all counts.

On July 30, 1975, Judge Frankel imposed a sentence of 18 months in prison on Count 1. Imposition of sentence was suspended on Count 2 through 21 and defendant was placed on probation for a period of three years following his release from confinement under the sentence on Count 1.* Defendant was denied bail pending appeal and is presently incarcerated.

Statement of the Case

A. The Government's Case

Taken in the light most favorable to the Government, the proof indicated that Melvin Davis participated in the cashing of 20 falsely endorsed savings bonds in a Philadelphia bank. At the time of the cashing, he was waiting outside in an automobile.

Mary Levy testified that on February 1, 1974 her pocketbook containing 40 savings bonds was stolen in

* The language of the judgment is ambiguous with respect to which counts the probation was imposed. At the sentencing, however, the Court said, "Specifically the sentence is as follows: On Count One, 18 months imprisonment. On the remaining counts Two through Twenty-One the Court will suspend the imposition of sentence and place Mr. Davis on probation for a period of three years following his release from confinement under the sentence on Count One." (Transcript of Sentencing, pp. 6-7).

New York City and that the endorsements of her name on the back of 20 of these bonds subsequently cashed in Philadelphia on February 22, 1974 were not her signature or authorized by her (T. 26-30).*

Sheila Ketchen testified that in early February, 1974 defendant Melvin Davis telephoned her from a Manhattan bar and asked her to help cash some bonds in the possession of another man, Kareem. She asked questions concerning the issue date of the bonds, and then met Davis and Kareem in the bar where Kareem showed her several bonds. Sheila Ketchen agreed to cash the bonds, but because of the bonds' early date of issue, she indicated she was too young to do it alone and suggested that an experienced friend of hers, Betty Kendrick, assist. Davis said that Kareem wanted 50 percent participation in any proceeds obtained. Ketchen then discussed the fact that Kendrick was in the hospital and asked Davis to wait a week. In a subsequent meeting, also in Manhattan, Ketchen and Kareem prepared false identification for use in cashing the bonds. Davis brought her to Kareem's apartment, but left for several hours while the work

* References marked "T." are to pages of the trial transcript.

was done. Ketchen suggested that since she had "cashed so many in New York" it would be easier to go out of state (T. 39).

Kendrick and Ketchen testified that on February 20, 1974 they drove with Davis in Davis' car to Kareem's home to pick up half the bonds. Davis then drove them to Connecticut where the two women entered several banks and attempted to cash some of the bonds. Betty Kendrick posed as Mary Levy and Sheila Ketchen as her nurse. On each occasion, Davis remained in the car. At one bank about \$1,000 in bonds were cashed, but all other attempts by the two women to cash the bonds were unsuccessful. At the last bank, in Weathersfield, Connecticut, most of the bonds were stamped as negotiated prior to the bank's refusal to cash the bonds, making negotiation of the same bonds at another bank difficult (T. 41-42, 100-102).

Ketchen testified that on their return to New York City, she and Davis went to the same bar, met with Kareem and reported on their lack of success and suggested they try again. Kareem agreed to take only 25 percent as his share. The \$1,000 was split four ways (T. 44).

Ketchen and Kendrick testified that the following day they drove with Davis to the Philadelphia area where the

two women went into four banks attempting to cash checks. Davis again remained in the car. At the last bank, 20 bonds, each of which subsequently constituted a single count in the indictment (Exh. 2), were cashed for total proceeds of almost \$4,000. Davis had custody of the bonds until the point where the women went into the bank and took custody of the cash proceeds when they came out. On the return to New York City, the group abandoned Davis' car after it broke down on the New Jersey Turnpike and finished the trip to New York by taxi. While in New Jersey, the proceeds were split four ways. Upon their return to New York, Kareem was paid his share (T. 46-47, 103-105).

Kendrick and Ketchen also testified that the following day, February 21, 1974, Kendrick rented a car. With Kendrick driving, the three proceeded to New Guilford, Connecticut where once again Ketchen and Kendrick entered several banks and Davis remained outside. The two women were unsuccessful in cashing any of the remaining bonds. Later, while they were eating outside a fast-food restaurant in New Guilford, they were questioned by a policeman. Davis and Kendrick freely identified themselves but Sheila Ketchen refused. All three disclaimed any knowledge of bonds. The

group then returned to New York where Ketchen and Davis reported to Kareem that they were unable to cash any more bonds (T. 64, 106-109).

The Government additionally called the tow truck driver on the New Jersey Turnpike, the man who drove the taxi from New Jersey to New York City, the New Guilford police officer, and the branch manager of the Weathersfield, Connecticut, bank to corroborate various details in the testimony of the two major witnesses, which details were all uncontested by the defense (T.84-96, 125-31). The genuineness and negotiation of the bonds were the subject of stipulations (T. 23-25; Exh. 1).

B. The Defense Case

The defendant did not testify and the defense called no witnesses. The defense did not contest Davis' physical presence on the three trips but attacked the credibility of the two witnesses who claimed Davis had knowledge of the scheme and participated in it. As part of a stipulation in the Government's case, the defense established that Davis had not signed the name Mary Levy on the back of the 20 bonds cashed in Philadelphia, and that while

fingerprints of both Kendrick and Ketchen were found on the bonds in evidence, fingerprints of Davis nowhere appeared on the bonds (T. 25-26).

Argument

THE DISTRICT COURT ERRED IN DENYING
THE DEFENDANT'S MOTION TO DISMISS
COUNTS 2 THROUGH 21 FOR FAILURE OF
THE GOVERNMENT TO ESTABLISH VENUE

Counts 2 through 21 of the indictment charged defendant Davis with unlawfully uttering forged instruments. The indictment alleged that the uttering was made in the Southern District of New York where the indictment was returned. The indictment also indicated that defendant Davis would be prosecuted under the aiding and abetting statute, 18 U.S.C., Section 2. The trial proof, however, indicated that the bonds were cashed in the State of Pennsylvania, leaving at best the argument that certain acts by Davis in the Southern District of New York in preparation for his trip to Pennsylvania were sufficient to establish venue here. At the close of the Government's case, defendant moved to dismiss Counts 2 through 21 on the ground that venue of the offense in the Southern District of New York had not been established (T. 132). The Court denied the motion (T. 144) and submitted the 20 substantive

counts to the jury on the theory that Davis committed acts of aiding and abetting in the Southern District of New York (T. 204-05). Defendant submits that it was error to submit the 20 counts to the jury.

The Constitution provides that criminal trials "shall be held in the State where the said Crimes shall have been committed." Article III, Section 2. This safeguard is reinforced by the command of the Sixth Amendment that the criminal trial shall have been "in the State and district wherein the crime shall have been conducted." See Travis v. United States, 364 U.S. 631, 634 (1961).

The crimes involved in Counts 2 through 21 are "single act crimes" because uttering the forged writing is the single unequivocal act which completes the offense. United States v. Rodriguez, 465 F. 2d 5, 9 (2d Cir. 1972). A single act crime may be tried only at one place "although preparation for its commission may take place elsewhere." United States v. Bozza, 365 F. 2d 206, 221 (2d Cir. 1966) (quoting other authorities). A principal cannot be prosecuted for his acts except in the place where the crime was committed. United States v. Bozza, supra, 365 F. 2d at 220-221 (discussion of DeLutro on Count 1); United States v. Sweig, 316 F. Supp.

1148 (S.D.N.Y. 1970), aff'd. 441 F. 2d 114 (2d Cir.); cert. denied 403 U.S. 932 (1971). Since all the bonds involved in Counts 2 through 21 were cashed in a single bank at a single time in Philadelphia, the Eastern District of Pennsylvania was the only appropriate venue to try a principal.

The Government maintains that since Davis was charged as an aider and abetter, acts by him in preparation for his trip to Pennsylvania are sufficient to provide an additional basis for venue in the Southern District of New York. See for example, United States v. Gillete, 189 F. 2d 449 (2d Cir.) cert. denied, 342 U.S. 827 (1951); United States v. Bozza, supra, 365 F. 2d at 221 (affirmance of Count 4); United States v. Rodriguez, supra, 465 F. 2d at 9, 10. But unlike the situation in those cases,* the acts involved on this appeal

* In Bozza, this Court in reversing the conviction on Count 4, noted that Bozza had no accessorial acts in the Southern District of New York. In Gillete, the defendant's only contact with the crime was counseling at a restaurant meeting in Manhattan. In Rodriguez, the defendant's accessorial acts occurred in the Eastern District of New York and he did not travel with Mrs. Pena to the Manhattan bank where the forged check was deposited. Similarly, in United States v. Sweig, supra, Judge Frankel contrasted the activities of Sweig who proceeded to Washington to meet at the SEC after his telephone call from New York City, with those of Veloshan which seem to have been limited to New York City (316 F. Supp. at 1162)..

were preparatory to a trip by Davis to the place of the crime. With the exception of the fact that Davis was outside the bank in the car and the two women were inside, there is little to distinguish Davis' role from that of Kendrick and Ketchen. The two women principals likewise engaged in some acts in the Southern District of New York in preparation for the trip. According to the testimony, Davis suggested the bonds be cashed, drove his car to Philadelphia, physically held the bonds until the two women went into the bank, took custody of the proceeds when they emerged from the bank, and later distributed the proceeds while being towed on the New Jersey Turnpike.

Under the common law, on the basis of these facts, Davis would have been a principal. He was both actually and constructively present at the commission of the offense. See People v. Lyon, 99 N.Y. 210, 215 (1885). The relevant distinction under the common law was between a principal in the first or second degree on the one hand and an accessory on the other. This distinction was based in part upon instigation and in part upon physical presence. A principal in the first degree was "the absolute perpetrator

of the crime; and in the second degree, he is who is present, aiding and abetting the fact to be done." An accessory, on the other hand, was neither "the chief actor in the offense, nor present at its performance, but is some way concerned therein." See 4 Blackstone, "Commentaries on the Laws of England", C. 3, 34-39, quoted at Kadish & Paulsen, "Criminal Law and Its Processes" (1969), p. 411. Thus, even without physical presence at the scene of the crime, an individual who was the formulating intelligence behind a plan or who actively directed others who were his agents, would also be charged as a principal. Under the facts set forth by the Government in its case, Davis would clearly have been a principal in the first degree since the proof indicated he both instigated and supervised the crimes and was physically present in Philadelphia outside the bank at their execution. See 1 Wharton, "A Treatise on Criminal Law", 11th Ed. (1912), §§ 240-245. Inasmuch as Davis was a principal, he could not be prosecuted for these crimes in New York. United States v. Bozza, supra; United States

v. Sweig, supra.*

Questions of venue are more than matters of procedure. As this Court recently noted, in criminal cases they may "raise deep issues of public policy in the light of which legislation must be construed." United States v. Natelli, ___ F. 2d ___, Slip Op. 5165, 5192 (2d Cir. July 28, 1975); United States v. Johnson, 323 U.S. 273, 276 (1944). "[V]enue ... is an essential part of the Government's case. Without it there can be no conviction." United States v. Gross, 276 F. 2d 816, 819 (2d Cir.), cert. denied, 363 U.S. 831 (1960). Defendant submits that in enacting the aiding and abetting statute, Congress never intended to broaden the restrictions on venue to the extent that a defendant whose involvement in terms of physical location and control made him a principal could be prosecuted outside the district of the crime when the actual perpetrator could not. The Government cannot escape the venue

* Even if Davis' physical presence outside the bank would have prevented prosecuting him as a principal prior to the enactment of the aiding and abetting statute, at least for venue purposes where place is determinative, Davis was a principal and should have been treated as one in determining the required place of prosecution. He was as much a principal for venue purposes as his two companions.

requirement simply because there were three principal actors in each of the substantive crimes in this case. For this reason, Counts 2 through 21 should have been dismissed at the close of the Government's case for failure to establish the requisite venue.

Conclusion

For the reasons stated, we respectfully submit that the convictions on Counts 2 through 21 should be reversed and judgment dismissing the indictment with respect to these counts should be entered.

Respectfully submitted,

Daniel J. Sullivan
Attorney for Defendant-Appellant
Melvin Davis
250 Park Avenue
New York, New York 10017

Dated: New York, New York
September 30, 1975.

APPENDIX

	Page
Docket Sheet Entries	1
Indictment	2
Charge of the Trial Court	T-178

There was no opinion of the
trial court.

D. C. Form No. 100 Rev.

JUDGE FRANKEL

75 CRIM. 147

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Ronald L. Garnett, AUSA. 791-2936
MELVIN DAVIS	
BETTY KENDRICK	
	For Defendant:
	MELVIN--

(06)	STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	RBC.	DIB.
	J.S. 2 mailed	Clerk					
	J.S. 3 mailed 2-	Marshal					
	Violation	Docket fee					
	Title						
	Sec.						
	18:371 Consp. to forg. savings bonds.						
	(One Count)						

DATE	PROCEEDINGS
2-11-75	Filed indictment. (Referred to Frankel, J. as a related matter)
2-13-75	BETTY KENDRICK - Deft & atty.Robert Leighton present..Enters a plea of GUILTY. P.S.I. ordered sentence date 3-31-75..Cont'd. on P.R.B. of \$2500 as set on ind.74Cr.1160.....Frankel,J...
2-24-75	MELVIN DAVIS - Deft not present..Court enters a plea of not guilty..B/W ordered. Lasker,J.....
2-24-75	MELVIN DAVIS - Bench warrant issued.....
2-26-75	Filed affdvt. of Ronald L.Garnett,AUSA in support of a writ..Ret.3-3-75...
3-4-75	M.DAVIS - Produced on writ. no atty.present..pleads n.g. bail set at \$2,500.00 cash or surety..Frankel,J.
3-12-75	M. DAVIS - Filed writ of H/C ad pros. with marshals return..
	- OVER -

PROCEEDINGS

MELVIN DAVIS - Motion for reduction of bail granted..Bail set at ~~\$500~~ \$1,000 cash..
Defts application to be relieved of Thomas J.Cleveland as his atty.granted.
Deft to notify Court of his new counsel by noon April 11..Motions returnable
Apr.28-75...Remanded.....Frankel,J....

MELVIN DAVIS - Filed appearance bond in amt.of \$1,000...

M.DAVIS - Filed remand dated 4-3-75

B. KENDRICK: Filed Judgment.(Atty Morton Katz present) Imposition of prison sentence is
suspended. Deft is placed on probation for a period of Eighteen (18) Months, subject
to the standing probation order of this Court. Probation to run concurrently with
with probation imposed on Indictment 74 Cr. 1160. Frankel, J' Ent . 4-18-75

MELVIN DAVIS. Mailed original copy (CJA) 1 to the A.O. for payment. Frankel, J.

BETTY KENDRICK - ~~Filed~~ Mailed original CJA 1 to A.O.Wash.D.C.for payment...Frankel,J.

MELVIN DAVIS - Filed certificate of readiness for trial.

12-33-050 Feb
2/11/75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

MELVIN DAVIS and
BETTY KENDRICK,

Defendants.

75 CRIM. 147

INDICTMENT

75 Cr.

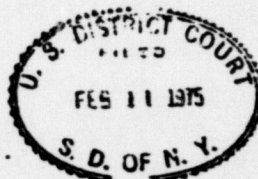
COUNT 1

The Grand Jury charges:

1. From on or about the 22nd day of February, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, MELVIN DAVIS and BETTY KENDRICK, the defendants, and Sheila Ketchen, named herein as a co-conspirator but not as a defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with others to the Grand Jury unknown to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 495.

2. It was a part of said conspiracy that MELVIN DAVIS and BETTY KENDRICK, the defendants, and Sheila Ketchen, would falsely make, alter, forge and counterfeit writings, to wit, the name of the owners of Series E, United States Savings Bonds on the backs thereof, for the purpose of obtaining and receiving from the United States and its officers and agents a sum of money, said United States Savings Bonds being genuine obligations of the United States.

3. It was further a part of said conspiracy that MELVIN DAVIS and BETTY KENDRICK, the defendants, and Sheila Ketchen would utter and publish as true, and cause to be uttered and published as true, such false, forged, altered and counterfeited writings, with the intent to defraud the United States, knowing the same to be false, forged and counterfeited.



MICROFILM

FEB 11 1975

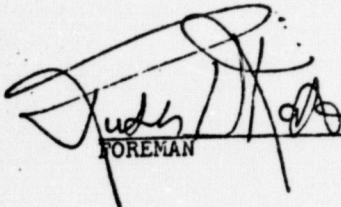
APPENDIX P 2

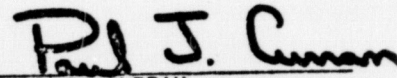
OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed by the defendants in the Southern District of New York and elsewhere:

1. On or about February 22, 1974, MELVIN DAVIS, BETTY KENDRICK, and Sheila Ketchen rode in a car from New York, New York, to Guilford, Connecticut;
2. On or about February 22, 1974, BETTY KENDRICK and Sheila Ketchen entered the Hartford National Bank, the Second New Haven National Bank, the Community Banking Company, and the First New Haven National Bank, all located in Guilford, Connecticut;
3. On or about February 23, 1974, MELVIN DAVIS, BETTY KENDRICK, and Sheila Ketchen rode in a car from New York, to New York, to Philadelphia, Pennsylvania;
4. On or about February 23, 1974, BETTY KENDRICK, and Sheila Ketchen entered the Cheltenham Bank, Lawncrest Branch, and the Industrial Valley Bank, both located in Philadelphia, Pennsylvania.

(Title 18, United States Code, Section 371).


FOREMAN


PAUL J. CURRAN
United States Attorney

4F17-25
175-

Def ~~227~~ KENDRICK, atty (Morton Katz) pre.
I.S.S. Prob is mo. to Sun community
with prob imposed in 7/6/66

Franklin J
(W)

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
THE UNITED STATES OF AMERICA

VS.

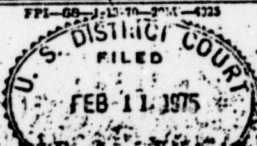
INDICTMENT

(18 U.S.C. § 371)

PAUL J. CURRAN
United States Attorney

A TRUE BILL

[Signature]
Foreman



Feb 24/1975 - Det. MELVIN DAVIS not pre (no atty) Court
ENTERED A PLEA OF N/G. ~~Case~~ ~~to~~ ~~the~~ order of.

Lasker T.

3-4-75 xly DAVIS no atty pres. enters a
plea of N.G. to ind. Bail set at
2,500.00 cash or surety, for

Frankel. J.

APR 3 1975 ^{U.S. JAVIS} motion for reduction of bail
granted. Bail set at 1,000.00 cash. Application
to be released of Thomas J. Cleveland, his
attly granted. Byt to notify Court of his new
address by Mon, April 11. motions returnable
Apr 15, 1975. Remanded.

Frankel. J.

CHARGE OF THE COURT

(Frankel, D.J.)

THE COURT: Members of the jury, we reach the next to the last stage, and then the critical point of this case when the matter will be left with you for your decision on the evidence and under the law.

It has been a short trial, relatively, but I need not emphasize to you that it is an important matter. It is important to the prosecution, it is important to the defense, it is important to the public in the administration of our laws that you, we, together seek a just result in this proceeding.

As you know, and we have all told you, and I now remind you, you are the judges of the facts. You are with exclusive and sovereign judges of the facts. It is your recollection and determination of them that will control the outcome of this case. It is not what counsel or I say in the end, it is your judgment as to where the truth lies that is determinative.

Remember, you are to find those facts from the evidence. You are to find them from the testimony you have heard from the witness stand, from the exhibits and from the stipulations that you heard read to you, that is,

certain agreements about facts that are not in dispute.

Remember, that the fact that somebody is accused is not evidence of any kind against him. The indictment is not evidence.

In response to that indictment, Mr. Davis entered a plea of not guilty. That meant that the burden was placed on the Government to establish his guilt beyond a reasonable doubt before he may be convicted of any of the charges against him.

As a corollary of that burden of proof on the Government, it is the law that a defendant is not called upon to prove his innocence. A defendant in a criminal case, in our system, is not required to present evidence of any kind at all. He is entitled to rely on his position that the Government has not sustained its burden of proof beyond a reasonable doubt.

A defendant with us is presumed to be innocent. I mentioned that to you yesterday, it has been mentioned to you again today, and I remind you that that presumption remains with the defendant throughout, and will be in his favor when you go to the jury room. It is a presumption that will only be overcome if and when you are convinced of his guilt beyond a reasonable doubt.

Remember, as a further corollary of the things I

1 have been saying, that having no burden to present evidence,
2 a defendant has the absolute right to decide for himself
3 with his counsel whether or not he will take the witness
4 stand. Mr. Davis has not taken the stand, making a
5 decision he was entitled to make. I instruct you now
6 that you must draw no inference of any kind against him
7 from his failure to testify. To protect his rights,
8 I instruct you that his not taking the stand should play
9 no part at all in your deliberations.
10

11 Now, we have all talked about the concept,
12 basic in our law, of proof beyond a reasonable doubt. You
13 are about to apply that concept in your deliberations and
14 it is necessary to undertake to define it for you.

15 When we speak in this setting of a reasonable
16 doubt, we mean what the words undertake to convey, a doubt
17 that is founded on reason. It is a doubt that has substance
18 and is not merely shadowy. It is a doubt which rests on
19 a jury's collective judgment, common sense and experience,
20 applied to the record of evidence in the particular case
21 before you. It is not an excuse to avoid performing what
22 may be an unpleasant duty. It is not a means for extending
23 sympathy to a defendant or to anyone. A reasonable doubt
24 is the kind of doubt that would cause a prudent person to
25 hesitate before taking action in some matter of importance

1 dhb
2 We deal in the law in probabilities, and so
3 I tell you that absolute certainty is not the test in
4 determining whether there has been proof beyond a reasonable
5 doubt.

6 I also tell you to sum up this aspect of the
7 instructions that I hope you realize from what I have said
8 that the burden of proof on the prosecution in a criminal
9 case is a very high one, and that you may convict only
10 if in the end your minds are free of the kind of reservation
11 and uncertainty I have undertaken to describe.

12 Now, you will keep these basic introductory
13 principles in mind throughout your deliberations together.

14 And now let's proceed toward the specific
15 accusations in this case and the particular problems that
16 are presented for your resolution.

17 First, let me tell you that all Federal crimes
18 are kinds of behavior defined and forbidden by Federal
19 statutes, enactments of the Congress. There are no common
20 law crimes, so-called, as there used to be, there are no
21 crimes defined by the Judges, there are no Federal crimes
22 except those that Congress has prescribed or proscribed and
23 defined in its statutes.

24 Just for your background information, you
25 don't have to memorize any of this, none of us do, let me

1
2 tell you that there are three such statutes that underlie
3 or are the basis of this particular prosecution.

4 First, there is the Federal conspiracy statute,
5 and it, which is Section 371 of Title 18 of our Criminal
6 Code, simply says this, so far as it is relevant here,
7 and I quote some of it:

8 "If two or more persons conspire to commit any
9 offense against the United States, then each..." shall be
10 guilty of a crime. That is the conspiracy statute.

11 Then there is a statute that forbids the utter-
12 ing and publishing of forged or false instruments. It is
13 Section 495 of our Criminal Code, and its language, again
14 reading only some of it, that is pertinent, says this:

15 "Whoever utters or publishes as true any false
16 or forged writing with intent to defraud the United States,
17 knowing the same to be forged..." commits a crime.

18 Now, the third statute I am going to mention
19 to you is the aiding and abetting statute, which is
20 Section 2 of our Criminal Code, and it, like the aiding and
21 abetting statutes in the States, says this for purpose
22 of the Federal law: "Whoever commits an offense against
23 the United States or aids, abets, counsels, commands,
24 induces or procures its commission, is punishable as a
25 principal."

I hope those statutes and their place in the case will take on some meaning for you as we go along.

Now, coming to the indictment, as I mentioned to you yesterday morning, this indictment has 21 counts or accusations in it. Count 1 charges a conspiracy, a violation of that conspiracy statute, and very generally described, and pretty soon I will read it to you, it says that the defendant, Melvin Davis, conspired with Betty Kendrick and Sheila Ketchen and one or more others to violate 18 U.S.C. Section 495, that uttering and publishing statute, from which I just read to you.

Then the remaining 20 counts, numbered 2 through 21, which I will be referring to sometimes as the substantive counts, charge the uttering and publishing of specific treasury bonds with forged endorsements in violation of that uttering and publishing statute, 18 U.S.C. Section 495.

Then, as I will also explain further in a little while, I tell you now that Mr. Davis, with respect to those 20 substantive counts, is charged as an aider and abettor under that Section 2 that I read to you as the third of the statutes I read, which again provides that somebody who aids and abets in the commission of a crime is punishable as a principal.

2 So, there is one conspiracy count, Number 1,
3 and 20 substantive counts, numbered 2 through 21, and now
4 to help you to make some sense of that, let me, for your
5 further background, try to indicate to you the distinction
6 in our law between a charge of conspiracy and the charge
7 of a substantive offense.

8 Very briefly, the essence of a conspiracy charge
9 is a charge of an agreement or plan or arrangement among
10 two or more people to do some illegal thing. It is the
11 agreement that is the heart of the crime of conspiracy. You
12 can have a conspiracy, that is, an illegal agreement, to do
13 some criminal thing, and the conspiracy may be proved and
14 guilt of conspiracy may be established even though the
15 unlawful objective of that conspiracy, the illegal thing that
16 it was agreed to do is never done or carried out.

17 Let me illustrate that for you by reference to
18 a kind of crime that has absolutely nothing to do with this
19 case, but is simply mentioned to you for illustrative pur-
20 poses.

21 You could have a conspiracy to commit a murder.
22 Two or more people could get together and agree to murder
23 Mr.X. Now, if they entered into their agreement and did
24 it knowingly and wilfully and took at least one step in
25 the direction of carrying it out, they could be guilty of

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the crime of conspiracy even though they never accomplished their objective, even though they never succeeded in killing the intended victim, Mr. X.

In that situation we would speak of murder without being technical as the substantive crime, and we would distinguish it from the conspiracy to commit murder. And so here, in this quite different case, we have a conspiracy to attempt to cash forged bonds, alleged in this indictment, and then we have 20 counts alleging the substantive offense of passing or cashing forged bonds.

I hope that will help you some as we now proceed to the details of this indictment to understand its basic organization and what are essentially two parts, the conspiracy charge, and then the 20 substantive counts.

Now, Count 1 charges the conspiracy, and again you don't have to commit to memory the details of the allegations of the indictment, but it is helpful, I think, to read it to you so that you set the instructions in the context of these specific accusations.

Count 1 says this -- and I might say I am going to read it in two installments, I am going to read the first three paragraphs of it, and then I am going to stop at a heading which says "Overt Act" and read what is under that heading to you later on for reasons that I trust

will become clear later on as I go through this.

Count 1. "The grand jury charges:

"1. From on or about the 21st day of February, 1974, up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Melvin Davis, the defendant, Betty Kendrick and Sheila Ketchen named herein as co-conspirators, but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with others to the grand jury unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 495.

"2. It was a part of said conspiracy that Melvin Davis, the defendant, Betty Kendrick and Sheila Ketchen, would falsely make, alter, forge and counterfeit writings, to wit, the name of the owner of Series E United States savings bonds on the backs thereof for the purpose of obtaining and receiving from the United States and its officers and agents a sum of money, said United States savings bonds being genuine obligations of the United States.

"3. It was further part of said conspiracy that Melvin Davis, the defendant, Betty Kendrick, and Sheila Ketchen would utter and publish as true and cause to be uttered and published as true such false, forged,

1 altered and counterfeited writings with the intent to
2 defraud the United States, knowing the same to be false,
3 forged and counterfeited."

4
5 Then there is that heading "Overt Acts," at
6 which I stop for the time being, and now I instruct you
7 with respect to Count 1 as follows:

8 Before you may convict Mr. Davis of this conspir-
9 acy charge, you must be satisfied beyond a reasonable doubt
10 that there has been proof of each and every one of three
11 essential elements. When I say each and every one, I mean
12 that literally, and that is to say that if any one of them
13 has not been established beyond a reasonable doubt, you
14 must acquit.

15 The three essential elements are these:

16 First, that at some time between approximately
17 February 21, 1974, and the date of the filing of this indict-
18 ment, which was in 1975, there was a conspiracy of the kind
19 the Government alleges, namely, a conspiracy to forge
20 endorsements on Series E savings bonds and to cash them,
21 which is what those words "utter" and "publish" mean, by pretend-
22 ing that the forged endorsements were the genuine and correct
23 signatures of the owner, the person to whom those bonds had
24 been issued.

25 Second, that the defendant here on trial,

Melvin Davis, wilfully and knowingly participated in that conspiracy.

Third, that one of the conspirators, whether it was Mr. Davis or any other, committed at least one of those overt acts alleged in the indictment, which I will soon read to you, for the purpose of carrying out that conspiracy.

I am going to go back over those three essential elements and elaborate on each of them.

As to the first, the requirement of proof that the kind of conspiracy alleged did exist, I have to say to you again some things about the nature of a conspiracy, the meaning of that concept in our law. A conspiracy is defined as an agreement or a combination of two or more persons acting together to accomplish some criminal or unlawful purpose.

As I said to you just a while ago, the unlawful agreement is the gist or essence of this crime of conspiracy. Now, although we speak of agreement and we sometimes say that a conspiracy is a kind of partnership in crime, you will understand obviously that we don't mean agreement or partnership as those words are used in the ordinary meaning of those terms in the context of legal and proper behavior. Common sense will tell you that if people enter into a criminal conspiracy, an agreement to violate the law, it is

likely to be an informal and often a tacit sort of understanding. Much may be left without being literally or expressly or carefully spoken. But you must understand that in order to establish a conspiracy, the evidence must show clearly and unequivocally an understanding among the alleged conspirators that they would work together in the illegal enterprise they are alleged to have undertaken.

To decide whether there was such an understanding, you look to the whole course of events as you find them to have happened from the evidence. You look at what people said, you look at what they did and you put those items together and decide from them, was there the kind of unlawful combination or agreement I have defined for you?

I repeat, that a conspiracy may be made out, may be shown to have existed, even if its objectives, the crimes for which it was formed, were not achieved. At the same time, you are also instructed, as I think common sense would tell you, that if the evidence establishes that the objectives were achieved, this may itself be taken as some evidence that the alleged conspiracy was in existence.

Now, your task, as I have said, is to take all the evidence in this case together, to decide from it what happened, who said and did what on the occasions of

what the Government alleges was this conspiratorial misbehavior.

And by putting all the evidence together in that way, decide together whether you are persuaded beyond a reasonable doubt that Mr. Davis and at least one of the others alleged to have been involved agreed expressly or tacitly to engage in the illegal uttering and publishing of forged writings for which it is alleged this conspiracy existed.

If you find yourselves persuaded of that, the precise period during which the conspiracy existed is not itself a matter of any great importance. Let me make clear what I mean. You will remember, perhaps, that when I read the indictment I read the allegation charges a conspiracy extending from on or about February 21, 1974, until the indictment was filed in 1975. And all I am saying at this point is that in order to prove the conspiracy, the Government is not required to show that it existed for that period or anything like it.

As you know, the contention of the Government centers on a period of about three days or so in February of 1974. And I instruct you on this subject of duration that if you find the conspiracy came into being under the instructions I have given you, then it is sufficient so far

as duration is concerned if the Government shows that it endured for some period which could be days during the whole of the period embraced by the allegations in the indictment.

That is essential element 1, the required proof of the existence of a conspiracy. If you don't find there was a conspiracy as I have defined it, your task is over on Count 1, you must acquit the defendant. If you do find there was such a conspiracy, go on and consider whether the Government has established essential element Number 2, its charge that Mr. Davis was a member of that conspiracy, that he participated in it.

Now, that question of membership or participation in a conspiracy must be considered by you with particular and specific reference to this individual defendant upon whom you are asked to reach a verdict. With respect to this subject of membership in a conspiracy as with respect to substantially all the subjects of our criminal law, guilt or innocence is an individual concept with us. We don't follow doctrines of guilt by association.

So in general, the question of membership respecting Mr. Davis is answered by looking at the evidence or lack of evidence as it particularly and specifically relates or doesn't relate to him. Whether he was a participant in this conspiracy is something that needs to be

1 answered by reference to his own conduct, his own words,
2 his own movements, his own actions. Those, of course,
3 will be considered by you in connection with the conduct
4 or statements of other people insofar as you find connec-
5 tions with other people.
6

7 Obviously, in all the areas of life the things
8 that we say and do take on meaning and color and significance
9 by their relationship to other events in the world, including
10 the things that other people say and do. What we mean
11 when we say come here is to be determined by who is around
12 and who hears us and whom we are addressing when we say
13 come here.

14 And what we mean when we say you are welcome
15 may have significance only when you know who, if anybody,
16 said thank you.

17 So it goes. Here you will consider what you
18 find Mr. Davis to have said and done in connection with
19 what other people may have said or done where there are such
20 connections. But in the end, whether he was a member of
21 that conspiracy requires, as I have said, a particular and
22 specific finding as to him and whether he did wilfully and
23 knowingly join together with one or more of these other
24 people to do the unlawful things that the Government alleges

25 To find that a defendant, any defendant, was a

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2 member of a conspiracy, a jury must find that the defendant
3 knew the unlawful purpose or purposes and knowingly
4 associated himself with those purposes. A defendant must
5 be shown to have entered into the illegal agreement aware
6 of its basic nature and intending himself to participate
7 in carrying out its purpose.

8 Here, the nature of the conspiracy is such that
9 in order to be shown to have been a member, a defendant
10 must be proved to the jury's satisfaction to have had the
11 specific intent to violate the law against uttering or pub-
12 lishing, trying to cash or cashing forged writings and, of
13 course, in this case we are concerned with forged endorse-
14 ments on United States treasury bonds.

15 You will have in mind that mere association
16 or presence with one or more people who are engaged in
17 an illegal conspiracy or in illegal conduct is not enough
18 to make you a conspirator, nor is merely knowledge that
19 other people are conspiring sufficient to implicate somebody
20 in a conspiracy. What is necessary, as I have said, is
21 that the defendant be shown to have associated himself with
22 the illegal agreement knowing its purpose and knowing its
23 nature and intending, by his own participation, to promote
24 or assist in the accomplishment of the illegal objective.

25 The indictment charges, and the Government

1 dhb
2 must prove beyond a reasonable doubt before you may con-
3 vict, that the defendant entered into this conspiracy
4 knowingly and wilfully and I have used those words before.
5 They are critical words, they refer to the critical factor
6 of criminal intent. Of course, I have covered this sub-
7 ject substantially, the subject of knowledge and wilfulness
8 by pointing out to you that you cannot be a conspirator,
9 you cannot be a member of a conspiracy, unless you specific-
10 ally know what you are doing and what you are agreeing
11 to try to carry out.

12 Nevertheless, the words knowingly and wilfully
13 are words of special importance in an indictment, and I am
14 going to add a few words of more general instruction about
15 them in the context of which you will decide this element
16 of membership or alleged membership in the conspiracy.

17 In order to be shown to have acted knowingly
18 and wilfully, a defendant must be shown to have acted
19 deliberately and purposely with an awareness of what he was
20 doing and why he was doing it, and not as a result of
21 mistake or accident or inadvertence or in ignorance of what
22 was going on. A defendant need not be shown to have known
23 that he was violating some particular law or been shown
24 to have known that the citation of some particular statute
25 was such and such or so and so. But he must be shown to

1 dhb
2 have acted with a bad or evil intent, and that means, as
3 I have already said to you, he must be shown to have known,
4 in a case of this kind, that he was engaging in a plan to
5 try to cash forged instruments and doing that while he knew
6 that such efforts to cash forged instruments were forbidden
7 by the criminal law.

8 Now, when we talk about knowledge and wilfulness,
9 we are talking about the state of somebody's mind. The
10 state of somebody's mind is a fact -- some Judge long ago
11 said, it is as much a fact as the state of somebody's diges-
12 tion. But with both kinds of facts, their nature is such
13 that we can't commonly ascertain them by so-called direct
14 evidence. We can't normally look at somebody's mind and
15 decide what he thinks or believes or intends or knows.
16 And I won't pursue the subject of digestion, but it has
17 similar qualities for these purposes.

18 So, in the courthouse and in everyday life,
19 when we are trying to make judgments about the state of
20 somebody's mind, we very commonly rely and are very commonly
21 forced to rely on so-called circumstantial evidence. We
22 look at what the person does. We look at what he says.
23 We use whatever we know about him, his age, his awareness of
24 the world, and in the appraisal of all those circumstances
25 we decide what he intends, what he knows, what his motives

1 dnb

2 were or may be.

3 Similarly here, in determining whether Mr. Davis
4 knowingly and wilfully participated in the alleged conspiracy,
5 you will weigh all the evidence as you have heard it,
6 all the evidence as to what he said or did, or did not say
7 or did not do, and from all that evidence you will determine
8 whether the requisite state of knowledge and intent, as I
9 have defined them, was shown to your satisfaction.

10 Now, I have talked about elements 1 and 2, the
11 conspiracy and membership, and I told you if those are proved
12 you are still not permitted to convict of the conspiracy
13 count unless you are satisfied beyond a reasonable doubt
14 that at least one of the overt acts alleged in this indict-
15 ment committed for the purpose of furthering the conspiracy
16 actually took place. I might stop for a minute and tell
17 you the theory of that.

18 In general, it is the theory of our law of
19 conspiracy that though people might talk about doing some
20 illegal thing, if they stopped short after only talking with-
21 out doing any single act or saying anything further to carry
22 out the illegal objective, they ought not to be held to be
23 criminals. And the way we implement that premise is by
24 this overt act requirement.

25 A conspiracy normally cannot be established or

a conspiracy charge cannot be normally proved without proof of at least one overt act.

Now, this indictment under the heading where I stopped a while ago, alleges four overt acts, and I will read those to you. It says under that heading:

"In furtherance of said conspiracy and to effect the objectives thereof, the following overt acts, among others, were committed by the defendants in the Southern District of New York and elsewhere.

"1. On or about February 21, 1974, Melvin Davis, Betty Kendrick and Sheila Ketchen rode in a car from New York, New York, to Philadelphia, Pennsylvania.

"2. On or about February 21, 1974, Betty Kendrick and Sheila Ketchen entered the Cheltenham Bank, Lawncrest Branch, and the Industrial Valley Bank, both located in Philadelphia, Pennsylvania.

"3. On or about February 22, 1974, Melvin Davis, Betty Kendrick and Sheila Ketchen rode in a car from New York, New York, to Guilford, Connecticut.

"4. On or about February 22, 1974, Betty Kendrick and Sheila Ketchen entered the Hartford National Bank, the Second New Haven National Bank, the Community Banking Company, and the First New Haven National Bank, all located in Guilford, Connecticut."

1 dhh
2 You will have noticed that none of those four
3 alleged overt acts is in itself a crime. It is not criminal
4 to ride in a car, it is not criminal to enter a bank. But
5 those are alleged here as overt acts allegedly committed
6 in furtherance of the conspiracy in an attempt to carry out
7 the unlawful enterprise. And I remind you that the Govern-
8 ment must prove at least one of them. It is not required
9 for the conspiracy charge to prove more than one, but unless
10 it proves at least one, you may not find the defendant,
11 Melvin Davis, guilty on the conspiracy charge, which is
12 Count 1.

13 Now, we move on to the substantive counts,
14 Counts 2 through 21, and again I am going to read to you, and
15 this is briefer, and again you don't need to memorize this,
16 but just for your guidance, here is what the indictment
17 alleges -- and by the way, if any of you have a desire to
18 see the indictment later on in the jury room, if you let us
19 know about that we will send a copy of it in to you,
20 always remembering that it is just accusations and it is
21 not itself evidence of anything.

22 Counts 2 through 21: "The grand jury further
23 charges: On or about the 21st day of February 1974, in
24 the Southern District of New York, Melvin Davis, the defend-
25 ant, unlawfully, wilfully and knowingly and with intent to

defraud the United States, did utter and publish as true and caused to be uttered and published as true, false, forged and counterfeit writings, namely, the endorsement of the payee on United States Series E savings bonds, payable to Mrs. Mary Levy, 8201 19th Avenue, Brooklyn, New York, and described below, knowing the same to be false, forged and counterfeited, the bonds being genuine obligations of the United States."

And then for each of the Counts 2 through 21, there is listed one of those savings bonds. The whole of this group of 20 being, if I recall correctly, the Government's collective Exhibit 2 in evidence and it is essentially agreed that the numbers and dates and other indicia of these bonds, as alleged in the indictment, correspond to those bonds that constitute the collective Exhibit 2.

Again following the style of what I told you under Count 1, to justify or permit a conviction on these substantive counts, the Government must have proved beyond a reasonable doubt each and every one of four essential elements, and I will state those to you:

First, that the bonds in question were genuine obligations of the United States.

Second, that the endorsements on the back or backs of the bonds were forgeries, whether it was the defend-

ant or someone else who committed those forgeries.

Third, that on or about the date set forth in the indictment the defendant knowingly and wilfully aided and abetted others in cashing the bonds, knowing that the endorsements were forgeries.

And fourth, that the defendant, within the meaning of this concept, as I will give it to you, intended to defraud the United States.

Again, but more briefly going back over these elements, as to element 1 that these were genuine obligations of the United States, I remind you that the defendant and the Government have stipulated and agreed that the bonds in question were such genuine obligations, so you don't have any special concern with that subject.

As to element 2, that there were forged endorsements, that is not a subject of any complexity, you know that the writing or whether you know or not, I mention in these instructions, that the writing of the owner's signature or endorsement on a genuine United States treasury bond by a person other than the owner, when this is done knowingly and wilfully and without the owner's authority, is a forgery within the meaning of the statute and this second element, as I have just given it to you.

Now, the third essential element relates to

1 the provision in the statute that in the old law language
2 forbids the uttering or publishing of the forged instru-
3 ments. I think I have said to you, in any event, if
4 I have, I will repeat, that those words, uttering or pub-
5 lishing in the setting of this case, means simply presenting
6 for cash and cashing.
7

8 You also know it is the Government's claim that
9 the alleged co-conspirators, Miss Kendrick and Miss Ketchen
10 and most particularly Kendrick, after they had gone into
11 the banks, presented the bonds in exchange for cash, the
12 contention is that Melvin Davis, with respect to all of these
13 substantive counts, was an aider and abettor, not that he
14 himself presented them, uttered or published them, but
15 that he aided and abetted them, and under the statute I read
16 to you earlier, 18 U.S.C. Section 2, should, therefor, be
17 held punishable as a principal.

18 I have to tell you very briefly what we mean
19 by this notion of aiding and abetting. To find somebody
20 was an aider and abettor, you must find something substantial
21 ly more than mere knowledge on his part that a crime was
22 being committed, whether or not it was being committed by
23 people he knew or even by people he knew and was physically
24 near to. A mere spectator in the commission of a crime
25 is not a participant and not an aider and abettor.

1
2 On the other hand, it is not necessary, as
3 I have mentioned, to find that the defendant himself did
4 directly any of the acts of uttering or publishing as
5 those are alleged in these substantive counts.

6 So, to put this affirmatively, let me tell you
7 in general that to find someone aided and abetted in the
8 commission of a crime, you must find that he assisted, insti-
9 gated, participated in the arrangements for the commission
10 of that offense.

11 To determine whether Mr. Davis was an aider
12 and abettor in this case, ask yourselves these questions:
13 Did he wilfully and knowingly associate himself with the
14 venture of uttering and publishing those treasury bonds?
15 Did he participate in that venture as something that he
16 wished to help bring about? Did he himself have an inter-
17 est, a stake, in the success of that criminal activity? Did
18 he seek, by his own action, to help make it succeed?

19 If he did, you may find that he has been proved
20 guilty as an aider and abettor under those substantive
21 counts numbered 2 through 21, and one more point in connec-
22 tion with that subject of aiding and abetting. The indict-
23 ment charges that these acts of aiding and abetting occurred
24 in the Southern District of New York, which is the District
25 in which this Court sits and which embraces the counties of

Manhattan and Westchester and a number of others, but Manhattan and the Bronx perhaps are enough to think about for our purposes.

In order to convict Mr. Davis on any or all of these substantive counts, you must be satisfied that he committed acts of aiding and abetting in New York. I remind you in this connection that the Government makes certain contentions and asserts that these contentions have been established by the evidence. It contends that Mr. Davis solicited Sheila Ketchen in New York to arrange for her participation in the cashing of the bonds in banks which, according to the Government's claim, were to be banks in other states. It is contended by the Government that Mr. Davis, soliciting Sheila Ketchen, got her to bring Betty Kendrick into the venture as the person who would undertake ultimately to pass or cash the bonds.

It is alleged that in New York Mr. Davis brought Sheila Ketchen together with a man known in this record as Kareem, to arrange the details of Kareem giving them the bonds for the purpose of their uttering and publishing or attempting to cash them.

And it is asserted that Mr. Davis brought the two women, his alleged co-conspirators, together here in New York with the plan and the understanding that they would

1 go from here to the banks in Pennsylvania which are
2 involved in the substantive counts to cash those bonds.
3

4 I instruct you in this connection that if you
5 find these contentions related to conduct in New York to
6 have been proved beyond a reasonable doubt, then you may
7 find the evidence sufficient to establish aiding and
8 abetting in this District, which is to say in lawyer's language,
9 you may find the venue to have been established in
10 this record.

11 Finally, and briefly, you will recall that the
12 fourth essential element of this substantive offense is
13 the proof of an intent to defraud the United States. That
14 means simply that in this kind of case before you may convict
15 you must find that the defendant intended that at some
16 time some person or bank would be given the forged United
17 States bonds or would deal with those bonds under the
18 mistaken belief that they were true and genuine, not knowing
19 that the endorsements on them had been false.

20 The Government is not required, for purposes of
21 this element, to prove that the defendant actually caused
22 anyone in the end to suffer a pecuniary loss. It is only
23 necessary that the Government prove that the defendant intended
24 that someone at some time would be defrauded in the sense
25 that that person or organization would take those United

1 States savings bonds with their forged endorsements in the
2 belief that they were true and genuine, and, therefore,
3 appropriate to justify the giving of cash in return for those
4 endorsed documents.
5

6 Again, the Government is not required to prove
7 for this purpose that the Government of the United States
8 suffered any pecuniary loss. It is sufficient for the con-
9 ception of defrauding the United States in this setting
10 that the proof satisfy you that the administration of a
11 Government function or activity was intended to be impaired,
12 and here we talk of the function of issuing savings bonds
13 to proper recipients and assuring those recipients or
14 owners of the benefits they were supposed to be entitled to
15 as purchasers of those Government obligations.

16 Coming to the end of these instructions on
17 the substantive counts, I mention to you and stress to you
18 that the violations of the law here, as under the conspiracy
19 charge, are alleged to have been committed knowingly and
20 wilfully. I remind you that this means that the Government
21 must prove that the unlawful conduct was engaged in de-
22 liberately and purposely, not by mistake or accident with
23 an awareness that it was conduct forbidden by the criminal
24 law.

25 More generally, I remind you of the things I

said about the words knowingly and wilfully when I instructed you on the conspiracy charge, and I charge you here to apply those notions again in considering the substantive counts.

Now, so much for the law of these alleged offenses and the elements that must be proved if the defendant is to be convicted of any of them.

I have some more or less general things now and we approach the end of these instructions.

I want to talk to you very briefly about a rather obvious topic that would be in your minds whether we mentioned it or not, but it is a standard item in charges to juries, the subject of credibility. You realized before you came here that in a trial you depend on the witnesses who tell you allegedly about the events for your task of finding what the events really were. And so you, like every jury, must make judgments of credibility. The extent to which you may place credence in the witnesses who have testified before you, though it is a standard part of jury instructions, it is not a legal specialty. Lawyers and Judges are not thought in our system to be specially expert in deciding questions of credibility. We bring to the courthouse people who are lay persons so far as the law is concerned to serve as jurors, to apply their common sense and their wisdom to the situation, and make judgments of

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credibility in that fashion.

So here you will be testing credibility. You will be recalling the witnesses you have heard, and you will be considering together how each of them impressed you. Did he or she appear to be candid and straightforward, frank, honest, or did the witness appear to be shifty or evasive or suspect in some way?

Did the witness seem to know what he or she was talking about and, more importantly, did he or she appear to intend to tell you accurately the contents of that knowledge?

Was the testimony of any witness consistent or inconsistent within itself, and how did it relate to and how was it corroborated or contradicted by other aspects of the testimony?

If you find that anything that was told to you was false, consider its significance in the case. An error or a falsehood on a detail may not loom as large in your minds as an error or a falsehood about something central in the case. You may consider whether an inaccuracy was an error or was a falsehood in deciding the credibility of witnesses. If you find that any one witness has wilfully testified falsely to you about any material fact, you may, if you choose, disregard the evidence of that witness alto-

gether. Or you may credit such parts as you deem worthy of credence in performing your serious business of seeking and finding the truth.

On this subject of credibility, the arguments have touched and these instructions should touch one particular point, the subject of so-called accomplice testimony. You heard two witnesses yesterday, Sheila Ketchen and Betty Kendrick, who told you from this witness stand that they were participants in the offenses, in the substantive crimes and in conspiracy with which Mr. Davis is here charged. They told you, in other words, that they were his accomplices. And an accomplice is somebody who unites with some other person in the commission of a crime, voluntarily and sharing a common intent. An accomplice may be a competent witness to that crime precisely because of the accomplice's participation. Indeed, the Government not infrequently takes the view that it is compelled to rely on the testimony of alleged accomplices in order to prove criminal charges in cases it brings.

And I tell you that under the Federal law which governs this case the testimony of an accomplice alone, if it is believed by the jury, may be sufficient to sustain a verdict of guilty without other evidence or corroboration to support it.

1 dhb
2 You may recall in that connection that the
3 Government claims it has corroboration but I give you the
4 rule for your consideration in any event.

5 Having said those things about accomplice testi-
6 mony, I also instruct you that you are expected and re-
7 quired under the law to scrutinize such testimony with par-
8 ticular care, and to weigh it with particular caution in
9 determining whether it is credible. Having heard the
10 arguments of counsel, you will want to pay attention to what
11 you think are the motives or possible motives of those two
12 witnesses in determining whether they came here to tell
13 you truthfully what they knew.

14 Was the testimony of either of them induced by
15 some promise or belief that they might receive favorable
16 consideration for themselves by giving their testimony?
17 If they had an interest in the effect of this testimony
18 on their own self-interest, were they led to believe that
19 they would help themselves best by coming here and lying,
20 or that they would help themselves best by coming here and
21 telling the truth?

22 Did either witness believe that her own self
23 interest would be served by falsely implicating Mr. Davis,
24 or did either or both of them believe that their best inter-
25 ests were served by coming here and telling the truth; and

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did they, therefore, speak the truth when they gave the

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testimony that they did against him?

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You will weigh such questions in considering both of these women in determining their credibility,

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in considering their role as accomplices as they told you

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about it, and in considering all the factors that bear on

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credibility affecting them, just as you will weigh all the

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pertinent factors as you find them in assessing the cred-

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ibility of all the witnesses.

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Now, when you come to do that, when you come to deliberate on credibility and on the other questions we are

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placing before you, there will be 12 of you in the jury room.

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Obviously it is expected that the 12 of you will reason

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together. Each of you will feel not only permitted but

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expected to contribute your own wisdom, your own point of

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view to those deliberations. By the same token, so that it

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may work rationally and in an orderly way, you will feel

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prepared and obliged to pay respectful and courteous attention

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to the views of your fellow jurors. I think you know,

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but I remind you in any event that in order to reach any

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verdict the jury must be unanimous. But the unanimous

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verdict of a jury in the end must reflect and represent the

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individual vote of each of you in your conscience and your

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rational judgment.

1 dhh
2 If, when you are deliberating, you feel you
3 need to hear any of the evidence again, send us a note about
4 that through your forelady and we will proceed to undertake
5 to find it and get it read to you as quickly as we can.
6 If you want to hear any of these instructions again, send
7 us a note about that and again we will comply with your
8 needs as promptly as we can.

9 We are going to bundle up and send to the jury
10 room with you for your convenience the exhibits and we
11 ask you, of course, to keep them together in an orderly way
12 and plan to redéposit them with us after they have served
13 your purpose.

14 If, while you are deliberating, you have occasion
15 to send us a note and you are divided at that time, don't
16 report to us how the vote stands, that is a private matter
17 for the jury and one on which we should not be advised or
18 in which we ought not to intrude.

19 There are, as you know, 21 counts, that is 21
20 separate counts, and under the procedure we follow, we ask you
21 to deliver a verdict touching each of them if and when you
22 reach it separately, orally, through your forelady, in
23 open court.

24 And now before I let you go and excuse our
25 alternate jurors, let me see if there are other or different

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things that counsel want me to tell you.

Are there exceptions, gentlemen? If so,
come to the side bar.

MR. GARNETT: None, your Honor.

THE COURT: Mr. Sullivan?

(At the side bar.)

MR. SULLIVAN: I believe your Honor said that
if the objectives of a conspiracy were achieved this may
be taken as some evidence of its existence and I would object
to that.

THE COURT: All right. It is overruled.

Anything else?

MR. SULLIVAN: Nothing.

(In open court.)

THE COURT: Mr. Murray, and Miss Farwell, since
the first 12 we have impaneled have survived and all appear
to be in good health, it comes time to excuse you. Before
I do that, let me just say that we appreciate your partici-
pation and your help in this, and we bid you good afternoon
now, with our thanks and good wishes and with the advice,
according to Mr. Swanciger, that if you go back to Room 109,
they will probably excuse you from further service there.

Thank you, and, good afternoon.

(Alternate jurors excused.)

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THE COURT: Now, if we may have the marshals sworn, the jury may then retire.

(One marshal sworn.)

THE COURT: Let me just remind you, ladies and gentlemen, because I jsut as soon you know your schedule, we have asked the marshal to arrange to take you to lunch at 12:30. I see it is almost 12:30 now. I have told you to send us notes if you need anything, and I have promised you that we will respond as quickly as we can. I don't think it is of any practical significance any more because it is probably going to be approaching two o'clock when you get back from lunch.

But I remind you that we won't be available until after 2:00, so I hope you can manage until then without us.

Now, you will retire, please.

(At 12:22 P.M. the jury retired to deliberate.)

THE COURT: All right, gentlemen, let's understand. We are all relieved until two, but then we will all stand by, yes?

(Luncheon recess.)
